U.S. Department of Justice

Immigration and Naturalization Service

87

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

Public Copy

File: [redacted] Office: Nebraska Service Center Date: JAN 10 2001

IN RE: Petitioner: [redacted]

Petition: Immigrant Petition by Alien Entrepreneur Pursuant to § 203(b)(5) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(5)

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

IN BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Mary C. Mulrean, Acting Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner seeks classification as an alien entrepreneur pursuant to § 203(b)(5) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(5).

The director determined that the petitioner had failed to demonstrate that she had invested in a targeted area, that she had established a new commercial enterprise, that her investment had been made available to the job-creating enterprise, that her funds were obtained from a lawful source, or that she had created or would create the necessary employment.

On appeal, counsel argues that the petitioner has invested in a targeted area, that the Service interpreted "established" too strictly, that the director should not have applied precedent decisions issued by the Administrative Appeals Office (AAO) retroactively, that the petitioner has demonstrated the lawful source of her funds, and that she would create at least 10 new jobs.

Counsel also requests oral argument. Oral argument is limited to cases in which cause is shown. A petitioner or her counsel must show that a case involves unique facts or issues of law that cannot be adequately addressed in writing. In this case, no cause for oral argument is shown. Therefore, the petitioner's request for oral argument is denied.

Section 203(b)(5)(A) of the Act provides classification to qualified immigrants seeking to enter the United States for the purpose of engaging in a new commercial enterprise:

> (i) which the alien has established,
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> (ii) in which such alien has invested (after the date of the enactment of the Immigration Act of 1990) or, is actively in the process of investing, capital in an amount not less than the amount specified in subparagraph (C), and
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> (iii) which will benefit the United States economy and create full-time employment for not fewer than 10 United States citizens or aliens lawfully admitted for permanent residence or other immigrants lawfully authorized to be employed in the United States (other than the immigrant and the immigrant's spouse, sons, or daughters).

MINIMUM INVESTMENT AMOUNT

The petitioner indicates that the petition is based on an investment in a business located in a targeted employment area for which the required amount of capital invested has been adjusted downward to $500,000.

8 C.F.R. 204.6(e) states, in pertinent part, that:

> *Targeted employment area* means an area which, at the time of investment, is a rural area or an area which has experienced unemployment of at least 150 percent of the national average rate.

8 C.F.R. 204.6(j)(6) states that:

> If applicable, to show that the new commercial enterprise has created or will create employment in a targeted employment area, the petition must be accompanied by:
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> (i) In the case of a rural area, evidence that the new commercial enterprise is principally doing business within a civil jurisdiction not located within any standard metropolitan statistical area as designated by the Office of Management and Budget, or within any city or town having a population of 20,000 or more as based on the most recent decennial census of the United States; or
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> (ii) In the case of a high unemployment area:
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> (A) Evidence that the metropolitan statistical area, the specific county within a metropolitan statistical area, or the county in which a city or town with a population of 20,000 or more is located, in which the new commercial enterprise is principally doing business has experienced an average unemployment rate of 150 percent of the national average rate; or
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> (B) A letter from an authorized body of the government of the state in which the new commercial enterprise is located which certifies that the geographic or political subdivision of the metropolitan statistical area or of the city or town with a population of 20,000 or more in which the enterprise is principally doing business has been designated a high unemployment area. The letter must meet the requirements of 8 C.F.R. 204.6(i).

In support of the petition, the petitioner submitted a letter from [redacted] of the [redacted] of [redacted]

asserting that [redacted] suffered an unemployment rate more than 150% the national rate in 1995. The director, relying on Matter of Soffici, I.D. 3359 (Assoc. Comm., Examinations, June 30, 1998) at 2-3, concluded that the petitioner had not demonstrated that [redacted] was a targeted employment area at the time of filing, June 15, 1998. The director also stated that [redacted] failed to provide the method used to determine the unemployment statistics.

On appeal, counsel asserts that there is no regulatory requirement to provide the methods used to determine unemployment statistics, that Matter of Soffici incorrectly concluded the targeted area must be so designated at the time of filing instead of when the enterprise is established, and provides a new letter from [redacted] confirming the unemployment rate for [redacted] remained over 150% of the national rate in 1997.

While Matter of Soffici is binding regarding the designation of a targeted area at the time of filing, the petitioner has now established that [redacted] was a targeted unemployment area at the time the petitioner filed the instant petition. We agree with counsel that the state official confirming the unemployment rates need not provide the methods used to determine those statistics. Therefore, the minimum investment amount in this case is $500,000.

THE PETITIONER HAS NOT ESTABLISHED A NEW COMMERCIAL ENTERPRISE

Section 203(b)(5)(A)(i) of the Act states, in pertinent part that: "Visas shall be made available . . . to qualified immigrants seeking to enter the United States for the purpose of engaging in a new commercial enterprise . . . *which the alien has established* . . . ." (Emphasis added.)

8 C.F.R. 204.6(h) states that the establishment of a new commercial enterprise may consist of the following:

> (1) The creation of an original business;
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> (2) The purchase of an existing business and simultaneous or subsequent restructuring or reorganization such that a new commercial enterprise results; or
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> (3) The expansion of an existing business through the investment of the required amount, so that a substantial change in the net worth or number of employees results from the investment of capital. Substantial change means a 40 percent increase either in the net worth, or in the number of employees, so that the new net worth, or number of employees amounts to at least 140 percent of the pre-expansion net worth or number of employees. Establishment of a new commercial enterprise in this

> manner does not exempt the petitioner from the requirements of 8 CFR 204.6(j)(2) and (3) relating to the required amount of capital investment and the creation of full-time employment for ten qualifying employees. In the case of a capital investment in a troubled business, employment creation may meet the criteria set forth in 8 CFR 204.6(j)(4)(ii).

8 C.F.R. 204.6(e) states that:

> *Troubled business* means a business that has been in existence for at least two years, has incurred a net loss for accounting purposes (determined on the basis of generally accepted accounting principles) during the twelve or twenty-four month period prior to the priority date on the alien entrepreneur's Form I-526, and the loss for such period is at least equal to twenty per cent of the troubled business's net worth prior to such loss. For purposes of determining whether or not the troubled business has been in existence for two years, successors in interest to the troubled business will be deemed to have been in existence for the same period of time as the business they succeeded.

According to the plain language of section 203(b)(5)(A)(i) of the Act, a petitioner must show that she is seeking to enter the United States for the purpose of engaging in a new commercial enterprise that she has established. The alleged new commercial enterprise at issue here is [redacted], in which the petitioner became a limited partner on June 5, 1998.

In Matter of Izumii, a petitioner who became a limited partner in a limited partnership over 19 months after the establishment of the limited partnership was found to have had no hand in the partnership's creation and was not present at its inception. Matter of Izumii, I.D. 3360 (Assoc. Comm., Examinations, July 31, 1998) at 29. As the General Partner and Original Limited Partner entered into the Partnership Agreement for [redacted] on February 9, 1996, and the petitioner did not become a Class A Limited Partner until over a year later, the director concluded that the petitioner had not established [redacted]. The director further noted that not only was the petitioner not present at the time [redacted] was created, [redacted] was essentially assuming the business of [redacted], the general partner of [redacted] which was established in 1992.

On appeal, counsel argues that the director's interpretation of "established" is overly strict, that 8 C.F.R. 204.6(g) essentially waives this requirement for multiple investors, and that the director erroneously applied Matter of Izumii retroactively as the

petitioner had relied on the previous approvals of similar petitions and prior Service policy in making her investment.

Matter of Izumii is binding precedent and is based solely on the plain language of the statute and regulations. Counsel's assertion that 8 C.F.R. 204.6(g), which merely permits investments by multiple investors, essentially waives any establishment requirement by saying a petitioner may use the "establishment" of an enterprise by more than one investor is not supported by the plain language of the regulations. If counsel's interpretation were correct, the requirement in 8 C.F.R. 204.6(g)(1) that a petitioner demonstrate the source of other funds invested into the new commercial enterprise would be impossible as the first investor might not even know the identity of subsequent investors.

In R.L. Investment Limited Partners, 86 F.Supp.2d 1014, (D. Hawaii 2000) the district court concluded that the AAO precedent decisions did not involve rulemaking. Regarding the Service's application of the precedent decisions, the District Court for the Western District of Washington stated in an unreported decision:

> Although it is clear to this Court that the plaintiff designed its program based upon a different interpretation of the governing regulations than that applied by Izumii, and although the plaintiff received prior positive feedback from the Service regarding its program design, the law is clear that the "prior approvals simply represented the Agency's prior (short lived) interpretation of the statute . . . [which] [t]he Agency was free to change." Chief Probation Officers v. Shalala, 118 F.3d 1327, 1334 (9th Cir. 1997.) Golden Rainbow Freedom Fund v. Janet Reno, Case No. C99-0755C (W.D. Washington Sept. 14, 2000).

That court specifically noted that there had been no long-standing history or previous binding decisions from which an irrational departure would not be allowed.

The AAO precedent decisions merely clarified and reaffirmed longstanding statutory and regulatory law as applied to certain facts presented, which happen to exist in this case as well. They did not impose additional requirements beyond those already set forth by the regulations. Therefore, the director correctly relied on Matter of Izumii.

In light of the above, it cannot be concluded that the petitioner established a new commercial enterprise within the meaning of the Act. For this reason, the petition may not be approved.

Moreover, in a business venture of this type, the [redacted] is conceived of and developed by the General Partner.

The General Partner then recruits investors to serve as limited partners. In order for all limited partners to satisfy the "establishment" provision of § 203(b)(5) of the Act, wherein the limited partnership is presented as an original business pursuant to 8 C.F.R. 204.6(h)(1), the General Partner must complete its recruitment of those investors prior to "establishing" the Partnership. See also Matter of Izumii, supra.

There are additional provisions whereby investors may satisfy the establishment requirement by investing in an existing business. 8 C.F.R. 204.6(h)(2) provides that an alien investor may demonstrate that he or she has purchased an existing business, and restructured or reorganized that business, such that a new enterprise results. 8 C.F.R. 204.6(h)(3) provides that an alien investor may demonstrate that he or she has invested in and expanded an existing business with the result of a 40 percent increase in the net worth or the number of employees of that business. It would be difficult, if not impossible, for a petitioner in a limited partnership, where partners join sequentially, to satisfy either of these requirements.

Due to the inherent nature of a limited partnership, no individual partner or partners purchase the business in its entirety and therefore could not satisfy the establishment requirement under 8 C.F.R. 204.6(h)(2). Additionally, merely adding investment capital to an existing business would not result in any restructuring or reorganizing of the business. If the business were restructured or reorganized so that a new business resulted, it would negate the business plan of any existing investors.

Similarly, it is improbable in a limited partnership of three or more investors, each of whom invest the same amount of capital, to satisfy the establishment requirement by expanding an existing business by at least 40 percent as required under 8 C.F.R. 204.6(h)(3). An existing business is made "new" by virtue of a substantial increase in its net worth or in its number of employees. In order for a pre-existing business to be made new, the pre-existing business must have been fully functioning and doing business. The petitioner must also demonstrate that the "new business," that is the business as expanded, was "established" as of the filing date of the petition.

Finally, counsel argues that [redacted] is a "new" commercial enterprise because it was established after November 29, 1990, and is engaging in a for-profit activity. Therefore, counsel concludes, whether or not [redacted] is engaging in the same activity as the general partner [redacted] had already been engaging is irrelevant.

Counsel's argument fails to take into consideration the language in 8 C.F.R. 204.6(h) quoted above regarding *how* a petitioner can establish a new commercial enterprise. 8 C.F.R. 204.6(h)(1)

requires the creation of an *original* business. If [redacted] merely assumed the business activities of [redacted], then it is not an original business and must meet one of the other "establishment" requirements. The petitioner does not claim to have reorganized or substantially expanded [redacted] or [redacted].

Moreover, while not discussed by the director, the petitioner will not be engaging in the management of the enterprise. 8 C.F.R. 204.6(j)(5)(iii) states that if a limited partner is granted the "certain rights, powers, and duties normally granted to limited partners" under the [redacted] she is sufficiently engaged in the management of the partnership. Section 8.2 of the Partnership Agreement purports to grant Limited Partners the normal rights of a limited partner under the [redacted]. Under Section 12.1 of the Partnership Agreement, however, all Limited Partners irrevocably appoint the General Partner as their attorney-in-fact and agent with full power and authority to place and stead to execute, acknowledge and deliver and to file or record in any appropriate public office any certificate or other instrument necessary for the Partnership or any amendments to the Partnership Agreement. Being given a right and then immediately assigning it to someone else, irrevocably, is conceptually no different from being prohibited from exercising the right in the first place.

Despite the superficial language in Section 8.2, it is clear that the petitioner here does not in fact have the rights normally granted to limited partners under the ULPA. As such, the petitioner is a purely passive investor.

CAPITAL AT RISK

8 C.F.R. 204.6(e) states, in pertinent part:

> *Capital* means cash, equipment, inventory, other tangible property, cash equivalents, and indebtedness secured by assets owned by the alien entrepreneur, provided that the alien entrepreneur is personally and primarily liable and that the assets of the new commercial enterprise upon which the petition is based are not used to secure any of the indebtedness. All capital shall be valued at fair market value in United States dollars. Assets acquired, directly or indirectly, by unlawful means (such as criminal activities) shall not be considered capital for the purposes of section 203(b)(5) of the Act.
>
> *Invest* means to contribute capital. A contribution of capital in exchange for a note, bond, convertible debt, obligation, or any other debt arrangement between the alien entrepreneur and the new commercial enterprise does

not constitute a contribution of capital for the purposes of this part.

8 C.F.R. 204.6(j)(2) states:

> To show that the petitioner has invested or is actively in the process of investing the required amount of capital, the petition must be accompanied by evidence that the petitioner has placed the required amount of capital at risk for the purpose of generating a return on the capital placed at risk. Evidence of mere intent to invest, or of prospective investment arrangements entailing no present commitment, will not suffice to show that the petitioner is actively in the process of investing. The alien must show actual commitment of the required amount of capital. Such evidence may include, but need not be limited to:
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> (i) Bank statement(s) showing amount(s) deposited in United States business account(s) for the enterprise;
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> (ii) Evidence of assets which have been purchased for use in the United States enterprise, including invoices, sales receipts, and purchase contracts containing sufficient information to identify such assets, their purchase costs, date of purchase, and purchasing entity;
>
> (iii) Evidence of property transferred from abroad for use in the United States enterprise, including United States Customs Service commercial entry documents, bills of lading, and transit insurance policies containing ownership information and sufficient information to identify the property and to indicate the fair market value of such property;
>
> (iv) Evidence of monies transferred or committed to be transferred to the new commercial enterprise in exchange for shares of stock (voting or nonvoting, common or preferred). Such stock may not include terms requiring the new commercial enterprise to redeem it at the holder's request; or
>
> (v) Evidence of any loan or mortgage agreement, promissory note, security agreement, or other evidence of borrowing which is secured by assets of the petitioner, other than those of the new commercial enterprise, and for which the petitioner is personally and primarily liable.

The regulations provide that a petition must be accompanied by evidence that the petitioner has placed the required amount of capital at risk for the purpose of generating a return on the capital placed at risk.

A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. See Matter of Katigbak, 14 I&N Dec. 45, 49 (Comm. 1971). Therefore, a petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to Service requirements. See Matter of Izumii, supra, at 7. The director concluded the petitioner had failed to demonstrate that her investment was sufficiently at risk because not all of the money was made available to the job-creating enterprise, the Partnership was maintaining a reserve fund, and the Partnership Agreement authorized redemption agreements. These issues will be discussed below.

Capital Made Available to Job-creating Enterprise and Reserve Funds

Where a holding company which is not the entity most closely engaged in employment-creation is utilized as the investment vehicle, making the investment funds available to the holding company is not sufficient. Matter of Izumii, supra, at 11, note 7. The full amount of money must be made available to the business(es) most closely responsible for creating the employment upon which the petition is based. Id. at 11.

The director focused on the definition of "available cash" in the Partnership Agreement in determining that the petitioner's investment was not being made available to the job-creating enterprise, but was partially being used to pay partnership fees. On appeal, counsel points out that the definition is used to allocate profits and distribution upon dissolution and does not indicate any fees are being withheld from the petitioner's investment funds. As counsel's interpretation is consistent with the Partnership Agreement, the definition of "available cash" does not appear to indicate funds are being withheld from the employment-creation enterprise.

The director, however, also noted that the "Application of Funds" worksheet provided by the petitioner indicates that out of $40,000,000 in investor capital, $17,000,000 would be applied as "Limited Partner's Equity and Receivables."

Counsel argues that the high projected equity and receivables resulted because at the time, Limited Partners were able to invest with promissory notes. Counsel provides a new "Application of Funds" worksheet purporting to account for $67,244,930.56. The

worksheet, however, includes [redacted] and [redacted] funds. As the worksheet does not distinguish between those funds derived from [redacted] and those derived from [redacted] they cannot document how much of [redacted] capital was applied to the job-creating enterprises. The record remains absent clear evidence that all of the invested capital is being made available to the job-creating enterprises.

Moreover, on appeal, counsel submits the 1997 tax return for [redacted] one of [redacted] two subsidiary corporations. Schedule L indicates only $1,000 of common stock and no additional paid-in capital. The record does not contain any tax returns for the other subsidiary, [redacted], but the stock certificate in the file reveals VVPH purchased only 1,000 shares at $1.00 par value. The vast majority of the invoices contained in Exhibit 28 are addressed to [redacted] or simply [redacted] and not specifically to VVPH. Therefore, the record does not establish that these invoices were paid from the assets of VVPH and not its subsidiaries. The petitioner has simply not demonstrated that the capital investments of the Limited Partners are being made available to the employment-creating enterprise.

Redemption Agreement

For the alien's money truly to be at risk, the alien cannot enter into a partnership knowing that she already has a willing buyer in a certain number of years, nor can she be assured that she will receive a certain price. An investment assumes that a risk exists. The alien must go into the investment not knowing for sure if she will be able to sell her interest at all after she obtains her unconditional permanent resident status; and if she is successful in selling her interest, the sale price may be disappointingly low (or surprisingly high and more than what she paid). This way, the alien risks both gain and loss. Matter of Izumii, supra, at 18.

The director concluded that because the Partnership Agreement and Subscription Agreement both permit the General Partner to enter into redemption agreements with the Limited Partners, the petitioner's funds are not sufficiently at risk.

On appeal, counsel argues that the agreements merely authorize the General Partner to enter such agreements and does not indicate that the General Partner has entered into such an agreement with the petitioner. Counsel also notes that the General Partner is not obligated to enter such agreements and the Limited Partners are not guaranteed any specific payment should they sell back their interests.

Certainly the redemption provisions in the agreements are not as blatantly problematic as those in Izumii. According to the agreements, the petitioner is not guaranteed that VVPH will

repurchase her interest for the full $500,000 or, indeed, that [redacted] will repurchase her interest at all. The General Partner's authority to repay a Limited Partner up to the full amount of the investment without any input from other Limited Partners and without regard to the fair market value of the Partner's interest, however, indicates that the petitioner's investment is not entirely at risk.

SOURCE OF FUNDS

8 C.F.R. 204.6(j) states, in pertinent part, that:

> (3) To show that the petitioner has invested, or is actively in the process of investing, capital obtained through lawful means, the petitioner must be accompanied, as applicable, by:
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> (i) Foreign business registration records;
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> (ii) Corporate, partnership (or any other entity in any form which has filed in any country or subdivision thereof any return described in this subpart), and personal tax returns including income, franchise, property (whether real, personal, or intangible), or any other tax returns of any kind filed within five years, with any taxing jurisdiction in or outside the United States by or on behalf of the petitioner;
>
> (iii) Evidence identifying any other source(s) of capital; or
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> (iv) Certified copies of any judgments or evidence of all pending governmental civil or criminal actions, governmental administrative proceedings, and any private civil actions (pending or otherwise) involving monetary judgments against the petitioner from any court in or outside the United States within the past fifteen years.

A petitioner cannot establish the lawful source of funds merely by submitting bank letters or statements documenting the deposit of funds. Matter of Ho, I.D. 3362 (Assoc. Comm., Examinations July 31, 1998) at 6; Matter of Izumii, I.D. 3360 (Assoc. Comm., Examinations July 31,1998) at 26. Without documentation of the path of the funds, the petitioner cannot meet his burden of establishing that the funds are his own funds. Matter of Izumii, supra, at 26. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. Matter of Treasure Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972).

The petitioner claimed that $450,000 of her investment derived from a gift from her brother. In support of that claim, the petitioner submitted an affidavit from her brother [redacted]; a notarial certificate of relationship; an "accountant's recommendation;" a "certificate" from [redacted] attesting to ownership of 60% of that company and transfer of RMB 3,807,000 to [redacted] an Enterprise Registration Certificate and other company documentation indicating [redacted] established [redacted] on November 15, 1996 by investing [redacted] 600,000 of the total RMB 1,000,000 capital and owns 60% of the registered capital; a balance sheet for [redacted] indicating a total profit from November 1996 through November 1997 of RMB Yuan 24,603,287.84, all of which was retained; [redacted] tax returns; and fixed deposit receipts belonging to [redacted] totalling [redacted] 480,000.

The director concluded that the petitioner had not established the gift was properly registered and taxed, if necessary, and without bank statements, the petitioner had not established that the funds were transferred from her own account to the Partnership.

On appeal, counsel asserts that gifts are not taxable in [redacted] or [redacted] and that the documentation sufficiently establishes the petitioner's control over the money wired to the Partnership as the receipt identifies her as the source of the transfer.

Counsel notes the "voluminous documentation submitted" and asserts that such documentation was ignored by the director due to a predetermined conclusion that the petition should be denied regardless of any evidence to the contrary. The amount of documentation, however, is not as important to the adjudication as the content of the documentation. The record is absent any evidence that [redacted] ever transferred any money to the petitioner. His unsupported affidavit is insufficient. Without a canceled check or wire transfer receipt, the petitioner cannot demonstrate that her brother ever transferred $450,000 to either the account from which the petitioner wired $500,000 to the Partnership or another of the petitioner's accounts which she then transferred to the account from which she transferred funds to the Partnership.

Moreover, the inquiry into the lawful source of investment funds does not end upon a petitioner's claim that his funds include a "gift."[1] While the petitioner has submitted substantial

[1]Any petitioner intending to conceal the true source of his funds, such as for example a third-party loan, criminal or other unlawful activity, or earnings not subjected to appropriate taxation, could offer the convenient explanation that the funds

documentation regarding [redacted] business, the business was not established until November 1996. The petitioner has not demonstrated where [redacted] obtained the funds (RMB Yuan 600,000 which he invested in his business. In addition, as the balance sheet indicates the business retained all of its profits, Mr. Haijiang has not demonstrated that his business generated $450,000 of personal income for himself that he could donate to the petitioner.

Finally, the petitioner has not demonstrated the source of the money deposited in the fixed deposit accounts, nor does the record indicate Mr. [redacted] any of those accounts in order to obtain the $450,000 he allegedly gave the petitioner. The petitioner has not submitted five years of Mr. [redacted] tax returns as an indication of his income from a lawful source. In light of these failings, the petitioner has not demonstrated that her brother was the source of any money which she wired to the Partnership and that his funds (either given directly to her or first invested in his business or fixed deposit accounts) were lawfully obtained.

THE PLAN DOES NOT MEET THE EMPLOYMENT-CREATION REQUIREMENT

8 C.F.R. 204.6(j)(4)(i) states:

> To show that a new commercial enterprise will create not fewer than ten (10) full-time positions for qualifying employees, the petition must be accompanied by:
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> (A) Documentation consisting of photocopies of relevant tax records, Form I-9, or other similar documents for ten (10) qualifying employees, if such employees have already been hired following the establishment of the new commercial enterprise; or
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> (B) A copy of a comprehensive business plan showing that, due to the nature and projected size of the new commercial enterprise, the need for not fewer than ten (10) qualifying employees will result, including

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were a gift. Presenting a corroborating statement from a family member or "friend" would not be difficult, nor would transferring the funds first to the family member's account and then documenting their transfer into a newly established account belonging to the petitioner. The petitioner should not interpret this as an accusation that she has engaged in wrongdoing with respect to the source of his funds; rather, this is an explanation of why the Service cannot merely accept without further question every claim that funds are a "gift" and therefore lawfully obtained.

approximate dates, within the next two years, and when such employees will be hired.

8 C.F.R. 204.6(e) states, in pertinent part:

> *Full-time employment* means employment of a qualifying employee by the new commercial enterprise in a position that requires a minimum of 35 working hours per week.
>
> *Qualifying employee* means a United States citizen, a lawfully admitted permanent resident, or other immigrant lawfully authorized to be employed in the United States including, but not limited to, a conditional resident, a temporary resident, an asylee, a refugee, or an alien remaining in the United States under suspension of deportation. This definition does not include the alien entrepreneur, the alien entrepreneur's spouse, sons, or daughters, or any nonimmigrant alien.

Finally, 8 C.F.R. 204.6(g)(2) relates to multiple investors and states, in pertinent part:

> The total number of full-time positions created for qualifying employees shall be allocated solely to those alien entrepreneurs who have used the establishment of the new commercial enterprise as the basis of a petition on Form I-526. No allocation need be made among persons not seeking classification under section 203(b)(5) of the Act or among non-natural persons, either foreign or domestic. The Service shall recognize any reasonable agreement made among the alien entrepreneurs in regard to the identification and allocation of such qualifying positions.

In support of the petition, the petitioner submitted projected employment figures for VVLP and VVPH. The employment figures for VVPH do not indicate whether some of these positions are seasonal or part-time. The director concluded that the petitioner had not documented that she had created 10 full-time jobs at the time of filing.

On appeal, counsel asserts that the petitioner need not establish that she has already created 10 new jobs by the time the petition is filed. The director, however, acknowledged that the petitioner need only establish that she will create 10 new jobs.

Pursuant to 8 C.F.R. 204.6(j)(4)(i)(B), however, if the employment-creation requirement has not been satisfied prior to filing the petition, the petitioner must submit a "comprehensive business plan" which demonstrates that "due to the nature and projected size of the new commercial enterprise, the need for not fewer than ten

(10) qualifying employees will result, including approximate dates, within the next two years, and when such employees will be hired." To be considered comprehensive, a business plan must be sufficiently detailed to permit the Service to reasonably conclude that the enterprise has the potential to meet the job-creation requirements. The director also concluded that the petitioner had failed to submit a sufficient business plan.

On appeal, counsel asserts that [redacted] can be expected to create the same number of jobs as [redacted] subsidiary, [redacted] Inc. Counsel further argues that previous documentation submitted in 1995 regarding [redacted] should have been considered by the director and that the Partnership's tax returns are not necessary at the I-526 stage but have been submitted with other I-829s (Petitions to Remove Conditions on Residence) and should have been considered by the director. Finally, counsel asserts that employee records are too voluminous to submit as the industry has high turnover.

The petitioner submits the warranty deed transferring title of a packing house from [redacted] to its subsidiary, [redacted] House, Inc.; a letter from [redacted] accepting [redacted] as a member; a lease between DMB Packing Corporation (lessor) and [redacted] corporate tax returns for [redacted] subsidiary of [redacted]); 1997 corporate tax returns and Forms 6559 documenting 472 W-2s issued by [redacted] and 1184 W-2s issued from [redacted] Inc. (both subsidiaries of [redacted]; a copy of a 1995 letter regarding allocation of employees; a 1996 letter from the president of [redacted] accompanied by a list of employees for [redacted] and [redacted]; an employee list for [redacted] Inc., [redacted], Inc., and [redacted] Inc.; and invoices for [redacted] and [redacted] expenditures.

A comprehensive business plan as contemplated by the regulations should contain, at a minimum, a description of the business, its products and/or services, and its objectives. Matter of Ho, supra. Elaborating on the contents of an acceptable business plan, Matter of Ho states the following:

> The plan should contain a market analysis, including the names of competing businesses and their relative strengths and weaknesses, a comparison of the competition's products and pricing structures, and a description of the target market/prospective customers of the new commercial enterprise. The plan should list the required permits and licenses obtained. If applicable, it should describe the manufacturing or production process, the materials required, and the supply sources. The plan should detail any contracts executed for the supply of materials and/or the distribution of products. It should discuss the marketing strategy of the business,

> including pricing, advertising, and servicing. The plan should set forth the business's organizational structure and its personnel's experience. It should explain the business's staffing requirements and contain a timetable for hiring, as well as job descriptions for all positions. It should contain sales, cost, and income projections and detail the bases therefor. Most importantly, the business plan must be credible.

In order to demonstrate the creation of new jobs or that the petitioner will create new jobs, it is essential to determine how many employees [redacted] had when the petitioner invested. While multiple investors may allocate new employees among them, a petitioner cannot take credit for employment creation which occurred prior to her investment. Therefore, the petitioner must establish that her investment will create 10 new jobs after June 5, 1998.

The employee list for [redacted] Inc. indicates 152 employees as of October 16, 1998. The remaining employee lists and Forms 6559 relate to the employees of the subsidiaries of [redacted] Counsel provides no explanation for the unsupported assertion that [redacted] will create the same amount of employment as [redacted] has. Regardless, none of the submitted documentation indicates whether these employees are seasonal or full-time. Form 6559 for Von Verde Harvesting, Inc. indicates 472 W-2s, but only $1,936,765.90 in wages, amounting to only a little over $4,000 per year per employee. Form 6559 for [redacted] indicates 1184 W-2s but only $3,273,097.86 in wages amounting to only a little over $2,700 per year per employee. These numbers do not suggest full-time non-seasonal employment of qualifying employees.

Counsel's assertion that the payroll records are too voluminous to submit is not persuasive. While it may be true that the [redacted] business involves significant turnover, the petitioner could submit a representative sample covering three or four pay periods at different times of the year. (Given the seasonal nature of the business, the petitioner would also need to submit the records from the same period of the previous year in order to demonstrate any increase.) Further, counsel's assertion that tax records are not necessary at this stage is contradicted by 204.6(j)(4)(i)(A).

Finally, while counsel responds to the director's concerns regarding the sufficiency of the business plan by refusing to discuss the elements of a sufficient business plan, the record remains absent a business plan which encompasses the elements listed in Matter of Ho, quoted above. The petitioner has failed to provide a clear business plan which explains [redacted] staffing requirements, provides a timetable for hiring, and lists the job descriptions of the anticipated new jobs.

[redacted]

PREVIOUS DETERMINATIONS REGARDING [redacted] AND [redacted]

Counsel consistently criticizes the director for failing to consider the results of an investigation in 1994 and 1995 into VVLP and material previously submitted to the Service in support of other petitions.

The 1994 and 1995 investigations, however, must have reviewed only [redacted] as [redacted] was not established until February 9, 1996. Therefore, even if the conclusions were binding on the director, they could not have addressed the investment arrangements, employees and business activities of [redacted] and its subsidiaries.

Moreover, each petition is adjudicated on its own merits based on the record. The director is not obligated to track down every I-526 and I-829 related to [redacted] and [redacted] to determine whether information in those files might be helpful to the petitioner. It is the petitioner's burden to submit the documentation which establishes her eligibility.

Finally, whether other petitions have been approved based on an investment in [redacted] is simply not relevant as those cases may have differed from the instant petition or been approved in error.

For all of the reasons set forth above, considered in sum and as alternative grounds for denial, this petition cannot be approved.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not met that burden. Accordingly, the petition will be denied.

ORDER: The appeal is dismissed.

[redacted]